No. 10621.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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A. M. PEARSON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLANT'S BRIEF.

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LEE J. MYERS,
608 South Hill Street, Los Angeles 14,
*Attorney for Appellant.*



Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

## TOPICAL INDEX.

## TABLE OF AUTHORITIES CITED.

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### Jurisdiction.

This is an appeal by the defendant from a judgment of conviction and sentence of the United States District Court for the Southern District of California in an action brought by the United States of America for an alleged violation of Maximum Price Regulation No. 165, as Amended, issued by Leon Henderson, as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942. Judgment was entered November 22nd, 1943 and Notice of Appeal was filed November 26th, 1943.

Jurisdiction of the District Court was invoked under Section 205(b) of the Emergency Price Control Act (50 U. S. C. A. 925-c), and jurisdiction of this court is invoked under Title 18, Section 687 (U. S. C. A. 925-c) and Rule 3 of the Rules of Criminal Procedure, promulgated by the Supreme Court.

## Statutes and Regulations Involved.

This action involves the Emergency Price Control Act of 1942 and Maximum Price Reguation No. 165, as Amended (7 F. R. 10557) issued by the Office of Price Administration.

The sections of the Act, and of the regulations involved, and the pertinent provisions of each are as follows:

### Emergency Price Control Act.

Section 2(a) authorizes the Price Administrator, by Regulation or Order to establish such maximum price or maximum prices on commodities as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.

Section 4(a) reads:

> "It shall be unlawful * * * for any person to sell or deliver any commodity * * * in violation of any regulation or order under section 2, * * * or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 302(c) defines the term "commodity" to include:

> "Services rendered otherwise than as an employee in connection with the * * * repair * * * of a commodity or in connection with the operation of any service establishment for the servicing of a commodity."

Section 205(b):

> "Any person who willfully violates any provision of Section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, etc. * * *"

MAXIMUM PRICE REGULATION NO. 165, AS AMENDED.
Section 1499.101(a):

"Sales. No 'person' shall 'sell' or supply any of the 'services' set forth in paragraph (c) of this section at a price higher than the maximum price permitted by this Maximum Price Regulation No. 165, as amended."

Section 1499.101(c):

"Services covered. This Maximum Price Regulation No. 165, as amended shall apply to all rates and charges for the following services, except when such services are rendered as an employee."

Section 1499.101(c-45):

"Radios * * * maintenance, rental or repair of."

Section 1499.102:

"Maximum Prices for Services: General Provisions. Except as otherwise provided in Maximum Price Regulation No. 165, as amended, the seller's maximum price for any service to which this maximum Price Regulation No. 165, as amended, is applicable shall be:

(a) The highest price charged during March 1942 (as defined in this section) by the seller—

(1) For the same service."

Section 1499.102(e-1):

"For the purpose of this Maximum Price Regulation No. 165, as amended, the highest price charged by a seller during March 1942 shall be:

(1) The highest price which a seller charged for a service 'supplied' by him during March 1942."

Section 1499.108(b):

"Base-period records and reports. Every person selling services for which, upon sale by that person, maximum prices are established by Maximum Price Regulation No. 165, as amended, shall; prepare on or before September 1, 1942, to the full extent of all available information and records and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for services supplied during March 1942, for which prices were regularly quoted in that month, together with an appropriate description and identification of such services;

(2) The rate, if any, or the pricing method and charges, if any, regularly used during March 1942; and

A duplicate of this statement shall be filed, on or before September 10, 1942, with the appropriate 'War Price and Rationing Board of the Office of Price Administration.'"

## Statement of Facts.

Defendant owns and operates a small radio repair shop in the City of Los Angeles and has been at the same general location for fifteen years [R. 43]. On July 27th, 1942 he filed with the Office of Price Administration a list of his service charges in effect during the month of March 1942. This list was offered in evidence by the plaintiff, admitted as Exhibit 1, and furnishes the basis for the alleged violation.

Reference to said Exhibit 1 shows that defendant's rates for "time" were $2.00 per hour with fractions figured at 20¢ for five minutes or fractions thereof, 40¢ for ten

minutes or fractions thereof over five minutes and 50¢ for each fifteen minutes. This covered only time actually spent by the defendant or his employee, and did not include other costs of operations commonly referred to as "overhead." An additional charge of 10¢ to $2.50 was made to cover these costs of operations.

On March 31st, 1943, B. M. Johnson, a police officer of the City of Los Angeles, took a R. C. A. radio to the defendant's shop for repairs. He had no conversation with the defendant, but talked to "one of his employees" [R. 29]. He signed an order on which the word "Repair" was written in the handwriting of the employee [Exhibit C, R. 45]. The employee was in Ireland at the time of trial and was not available as a witness [R. 43]. All work upon the radio was done by the employee, who turned in to the defendant his time sheets showing the following time spent in repairs:

April 2nd, from 2:10 p. m. to 3:00 p. m., 50 minutes;
April 2nd, from 4:10 p. m. to 5:25 p. m., 1 Hr. 15 minutes; or a total of two hours and five minutes [R. 44].

On April 6th Johnson called for his radio and it was delivered to him by the defendant. The defendant prepared a bill from the employees time sheets for labor and material as follows:

| | |
|---|---|
| Labor | $4.70 |
| 1 No. 80 tube | .70 |
| 1 6D6 tube | 1.00 |
| Sales tax on tubes | .05 |
| Total | $6.45 |

This bill is in evidence as Exhibit 8. Included in the above figure was a charge for fifteen minutes time spent by the defendant in checking the work, checking the statement, taking the merchandise out of stock, making the billing * * * and delivering the radio to the customer. The price charged was the same as charged in March 1942 for similar time and service [R. 44]. There was no claim that the price charged for the tubes furnished was above ceiling.

This was not a repair job in the ordinary course of business, but was a carefully planned scheme by Officers Johnson and Lorenson to make a case against the defendant. Before taking the radio to the defendant's shop a rectifier tube had been purposely "burned out" [R. 32] as the most effective way to make the set inoperative [R. 32].

Defendant's employee was not advised of this. The effect of a "burned out" tube, as disclosed by the evidence, will be more fully referred to under "Argument."

## Specifications of Error.

1. The Verdict is contrary to law.
2. The Evidence is insufficient to support the Verdict.
3. The Court erred in denying defendant's Motion for a Directed Verdict of Acquittal on Count 6 at the close of plaintiff's case and at the conclusion of all the evidence.
4. The Court erred in overruling defendant's Motion for a new trial.

## ARGUMENT.

### I.

### The Verdict Is Contrary to Law.

The undisputed testimony disclosed that the Johnson repair job was taken in by the defendant's employee [R. 29] and that all of the work in making the repairs was done by the employee [R. 44]. A charge of 50 cents was made by the defendant for his time in checking the work, etc. [R. 44]. The original time record of the employee for the entire day of April 2nd was produced in Court, marked Exhibit G for identification, but at the Court's suggestion, was not put into the record [R. 44].

It is a well settled rule of law, both in the Federal Courts and in the State Courts of California, that a principal or employer is not liable criminally for the acts of his agent or employee unless he knowingly and intentionally aided and encouraged the criminal act committed.

> *United States v. Food and Grocery Bureau of Southern California,* 43 Fed. Supp. 966 at 971.

In the above case Judge Yankwich cites and quotes from several California and Federal cases, among which are the following:

> *People v. Doble,* 203 Cal. 510, at 511.
>
> "Before one can be convicted of a crime by reason of the acts of his agent, a clear case must be shown. The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law." (Citing *People v. Green,* 22 Cal. App. 45 at 50.)

The same rule is laid down in *Noble v. U. S.,* 284 Fed. 253 at 255, as follows:

> "Criminal liability of a principal or master for the acts of his agent or servant does not extend so far as his civil liability. He can not be held criminally liable for the acts of his agent, contrary to his orders and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent's employment, though he might be liable civilly." (Citing *Paschen v. U. S.,* 70 F. (2d) 491 at 503.)

Section 205(b) of the Emergency-Price Control Act of 1942 provides that "any person who willfully violates any provision of section 4 of this Act" shall be subject to fine or imprisonment. To be "willful" an act must be done knowingly and intentionally.

> *Johnson v. U. S.,* 260 Fed. 783 at 786-787.
>
> Bouvier's Law Dictionary, 8th Edition, Volume 3, page 3454.
>
> Words and Phrases, Volume 8, page 7468.

There is nothing in the record to indicate that the defendant had any knowledge of the time spent upon the Johnson repair job except the time record turned in by his employee. If there was an overcharge, which we emphatically deny, there is nothing in the record to indicate that the defendant knew it or that he was guilty of any "willful" act.

## II.

## The Evidence Is Insufficient to Support the Verdict.

Aside from the question of master and servant previously discussed, the evidence wholly fails to sustain the verdict. In order to prove the offense charged in Count 6 of the information, it was encumbent upon the plaintiff to prove that the defendant charged more than his highest prices during March 1942 (Maximum Price Regulation No. 165, as Amended, Section 1499.102(e-1).) As the charge made was based upon "time" spent in making repairs, it was necessary for the plaintiff to show that the "time" charged for was not actually spent. No such proof was offered. Giving the testimony of plaintiff's experts the most favorable interpretation, it disclosed that said "experts" could have located the trouble and repaired the radio in less time. If such evidence were sufficient—and we submit that it was not—it entirely ignores two factors, *viz.*:

(a) The deception practiced by Johnson upon defendant's employee, and

(b) The signed order calling for "Repairs."

The testimony for both the plaintiff and the defendant disclosed that a burned out rectifier tube would indicate to a radio technician many things. Plaintiff's witness, Barrett, testified that

> "It could be a shorted power transformer in your transformer set, a shorted filter, filter condenser, the speaker field coil shorted out, the frame, on rare occasions, shorted bypass condenser and also possibly a shorted tube. It might mean any one of these things" [R. 32, 45].

It was also conceded that radio tubes were scarce and that, if there were a short in the set and a new tube were replaced, it would blow out upon turning on the set [R. 32, 33, 45, 46, 49]; that it could also blow out other tubes [R. 49]. Had there been a "short" in the set it probably could have been located much more promptly. However, by reason of the deception practiced, the tube having been intentionally burned out outside of the set, and not by use, defendant's employee was faced with the problem of trying to locate a condition which did not exist. Obviously, this would require a greater amount of time.

Johnson's signed order to "Repair" the radio authorized and justified the employee in exercising his judgment as to what repairs were necessary to put the set in first class condition. While the defendant was deprived of the employee's testimony, the fact that the employee replaced a tube which, according to plaintiiff's witness, Barrett, played [R. 31], indicated that it was not efficient as, owing to the shortage of tubes, it would not have been replaced otherwise.

Plaintiff's witness, Barrett, testified that, if he were asked to put a radio set in first class condition and found "two shorted circuits on the 6D6 tube I would have to replace it to put it in first class shape, but you could get some reception out of the set with that short circuit" [R. 34].

Reference to defendant's listed prices [Exhibit 1] shows that he was entitled to charge $5.40—on 2 hours and 15 minutes of time—to cover "overhead" costs. No charge was made for this item, and the bill rendered was more than 50% below the amount the defendant could have legally charged.

III.

**The Court Erred in Denying Defendant's Motion for a Directed Verdict of Acquittal on Count 6 at the Close of Plaintiff's Case and at the Conclusion of All the Evidence.**

IV.

**The Court Erred in Overruling Defendant's Motion for a New Trial.**

The portions of the record in support of the foregoing Specifications of Error are set forth under I and II and a discussion of the evidence would result in repetition. The Court should have protected the defendant's rights either by granting the Motion for a Directed Verdict ,or by granting a new trial upon Count 6.

No reference has been made in this brief to the testimony of plaintiff's witnesses, Mary Galton, Mrs. Charles Leake or Walter Kramer. The testimony of these witnesses related to counts in the information on which the defendant was acquitted, and were inserted in the record over our objections. Objection was also made to the inclusion of Government's Exhibits Nos. 2, 3, 4, 5, 6, 7, 10, 11 and Defendant's Exhibits A, B, D, F, H, I and J on the same ground. The testimony of these witnesses and the exhibits referred to were included at the request of the Government and the request was granted by the trial court. We submit that they have no bearing upon the question raised by this appeal and should not be in the record. If we may be pardoned for anticipating the Government's claim, their contention for including this testi-

mony and the exhibits is predicated upon the theory that "other offenses" may be shown to prove intent. We submit, however, that an acquittal upon the counts to which this testimony and the exhibits related furnishes no basis for a claim of materiality.

## Conclusion.

It is respectfully submitted that the Judgment should be reversed.

Lee J. Myers,
*Attorney for Appellant.*